THE UNIVERSITY of EDINBURGH

Edinburgh Research Explorer

Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations

Citation for published version:
Morgera, E 2014 'Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations' University of Edinburgh, School of Law, Working Papers. https://doi.org/10.2139/ssrn.2424802

Digital Object Identifier (DOI):
10.2139/ssrn.2424802

Link:
Link to publication record in Edinburgh Research Explorer

Document Version:
Peer reviewed version

Publisher Rights Statement:
© Morgera, E. (2014). Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations. University of Edinburgh, School of Law, Working Papers. 10.2139/ssrn.2424802

General rights
Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy
The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

OPEN ACCESS

Download date: 05. May. 2023

University of Edinburgh
School of Law

Research Paper Series

No 2014/13

Benefit-sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations

Dr Elisa Morgera
Senior Lecturer in Global Environmental Law
University of Edinburgh, School of Law
elisa.morgera@ed.ac.uk

Forthcoming in The Environmental Dimension of Human Rights ed. Ben Boer (Oxford: Oxford University Press, 2014)

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the name(s) of the author(s), the title, the number, and the working paper series
© 2014 Elisa Morgera
Edinburgh School of Law Research Paper Series
University of Edinburgh

Electronic copy available at: http://ssrn.com/abstract=2424802

Abstract

This paper analyses the tight linkages between human rights and environmental degradation due to sub-standard corporate conduct. It then proceeds to outline the development of international standards on corporate responsibility and accountability in relation to environmental protection, highlighting the significant level of detail and convergence of international standards for corporate environmental accountability. Against this background, the paper systematically examines instances in which conceptual and normative developments under international environmental law, and in particular under the Convention on Biological Diversity, have contributed to developing international standards on corporate responsibility to respect human rights. The paper furthers the understanding of the key concept of benefit-sharing, teasing out its inter-state and intra-state implications, as well as its current and potential applications to private companies. It concludes with some future perspectives on the role of benefit-sharing in the context of the green economy vis-à-vis the environmental and human rights dimensions of corporate accountability.

Keywords

corporate accountability, international environmental law, human rights, biodiversity, benefit-sharing

Electronic copy available at: http://ssrn.com/abstract=2424802

Benefit-sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations

Elisa Morgera*

1. Introduction

Environmental rights were late arrivals to the body of human rights law.[1] Conversely, the human rights dimension of corporate accountability[2] has been subject to a slower and less sophisticated development than the environmental dimension at the international level.[3] This may explain why conceptual and normative developments related to corporate environmental accountability in international law are increasingly deployed to further the human rights dimension of corporate accountability.[4] In particular, the legal concept of 'benefit-sharing', developed under the Convention on Biological Diversity,[5] appears to be increasingly called upon to bridge the environmental and human rights dimensions of corporate accountability, insofar as indigenous peoples and local communities are concerned by the negative impacts of corporate conduct.[6] This chapter will investigate this little-studied phenomenon of cross-fertilization between international human rights and biodiversity law in relation to the accountability of multinational corporations.

*The author is grateful to Dr Annalisa Savaresi for her excellent research assistance and to Dr Lorenzo Cotula for his insightful comments on an early draft of this chapter.

[1] For an overview of the international debate in this regard: *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox*, UN Doc. A/HRC/22/43, 24 December 2012. There environmental rights are defined as 'rights understood to be related to environmental protection' (*ibid*., para. 7).

[2] For instance, a clause on human rights was only added in 2011 to the *Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development* (hereinafter, 'OECD Guidelines'), 2011 edition, available at http://dx.doi.org/10.1787/9789264115415-en), which, since 2000, has instead included a sophisticated clause on environmental protection. Generally on human rights and corporate accountability, see: M. K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999).

[3] E. Morgera, *Corporate Accountability in International Environmental Law* (2009).

[4] Morgera, 'From Corporate Social Responsibility to Accountability Mechanisms', in P. M. Dupuy and J. Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (2013) 32.

[5] Morgera and Tsioumani, 'The Evolution of Benefit-sharing: Linking Biodiversity and Community Livelihoods', 20 *RECIEL* (2010) 150.

[6] As discussed later in this chapter, and initially identified by Morgera, 'From Corporate Social Responsibility to Accountability Mechanisms', *supra* note 4, at 336-7 and 349.

Electronic copy available at: http://ssrn.com/abstract=2424802

Following a brief introductory discussion of key concepts in relation to corporate accountability in international law, the chapter analyses the tight linkages between human rights and environmental degradation due to sub-standard corporate conduct. It then proceeds to outline the development of international standards on corporate responsibility and accountability in relation to environmental protection, highlighting the significant level of detail and convergence of international standards for corporate environmental accountability. Against this background, the chapter then systematically examines instances in which conceptual and normative developments under international environmental law, and in particular under the Convention on Biological Diversity, have contributed to developing international standards on corporate responsibility to respect human rights. The chapter furthers the understanding of the key concept of benefit-sharing, teasing out its inter-state and intra-state implications, as well as its current and potential applications to private companies. It concludes with some future perspectives on the role of benefit-sharing in the context of the green economy vis-à-vis the environmental and human rights dimensions of corporate accountability.

2. Basic Concepts Related to Corporate Accountability in International Law

From a socio-legal perspective, multinational enterprises take advantage of the poor development of global institutions for the regulation of business to experiment in 'regulatory arbitrage', choosing to base their operations in countries with lax legal frameworks and limited or inefficient enforcement, and in 'creative compliance'.[7] The latter refers to private companies' practices of circumventing the law with the aim of 'fall[ing] outside the ambit of disadvantageous law and beyond the reach of legal control.'[8] In addition, multinational companies are notoriously able to influence the development and implementation of both national and international law through lobbying, negotiations, compromise and weakening of controls.[9] Nonetheless, the law has increasingly been used in 'subtle, indirect and creative ways', notably also in the

[7] The concepts of 'regulatory arbitrage' and 'creative compliance' are discussed by McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law and For Law', in D. McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 1.
[8] *Ibid*., at 48.
[9] *Ibid*., at 48.

absence of government action,[10] to shift the corporate focus from profit-maximization to responsibility towards a broader range of stakeholders in relation to communal concerns.[11] This is ultimately seen as leading business to review its attitude to law and compliance, shifting from minimum compliance with the letter of the law to compliance with the spirit of the law.[12]

These perspectives are particularly significant in the context of an analysis of the role of international law in defining acceptable standards and monitoring corporate conduct. Multinational companies often escape the control of national law because of the inefficacy of regulation and enforcement processes by host states over a subsidiary and by home States over a parent company.[13] On the other hand, multinational companies are significantly protected by international investment law, while they are generally not subject to corresponding international obligations.[14] Multinational companies sometimes also benefit from the protection of international human rights law: human rights standards on access to justice have in fact been invoked by multinational companies against states non-state parties in arbitrations based on bilateral investment treaties,[15] and breaches of bilateral investment treaties have been brought before human rights bodies on similar grounds.[16] In addition, multinational companies can profit from the gaps in international criminal and civil liability regimes with respect to environmentally damaging corporate conduct.[17]

[10] *Ibid*., at 5.
[11] *Ibid*., at 1.
[12] *Ibid*., at 61.
[13] See generally P. Muchlinski, *Multinational Enterprises and the Law* (2007).
14 See generally M. Sornarajah, *The International Law on Foreign Investment* (2004); and Maljean-Dubois and Richard, 'The Applicability of International Environmental Law to Private Enterprises', inDupuy and Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection, supra* note 4, 69.
[15] International Centre for the Settlement of Investment Disputes, *Mondev International Ltd. v. USA*, Award of 11 October 2002, ARB/(AF)/99/2, para. 144, as reported by Savaresi, 'The International Human Rights Implications of the Nagoya Protocol', in E. Morgera, M. Buck and E. Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (2012) 53, at 72.
[16] L. E. Peterson, *Human Rights and Bilateral Investment Treaties. Mapping the Role of Human Rights Law within Investor-State Arbitration* (2009), cited in Savaresi, *supra* note 15, at 72.
17 P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, (3rd ed., 2009), at 326-329; Morgera, *Corporate Accountability in International Law*, *supra* note 3, ch. 3.

The international community has debated the need for international regulation and oversight of multinational companies for almost 40 years.[18] These discussions have been particularly prominent in the context of international environmental law. As early as 1972, during the United Nations Conference on Human Development, discussions took place with regard to the role of business in the global protection of the environment and on the necessity of integrating environmental concerns into corporate decision-making.[19] As a result, the preamble of the Stockholm Declaration made a broad reference to the environmental *responsibility* of business.[20] More debate on the role of private companies occurred at the 1992 United Nations Conference on Environment and Development. The resulting Agenda 21 dedicated an entire chapter to 'Strengthening the Role of Business and Industry', making reference to *responsible* entrepreneurship.[21] In 2002, the World Summit on Sustainable Development (WSSD) referred for the first time to two separate concepts – corporate *responsibility* and corporate *accountability*.[22]

Drawing a distinction between these two terms is a useful preliminary step for present purposes. The term 'corporate accountability', as endorsed by the international community at the WSSD, can be understood as a legitimate expectation that reasonable efforts will be put in place, according to international

18 Early attempts were undertaken in the context of the UN Economic and Social Council, which adopted a resolution in 1972 acknowledging the lack of an international regulatory framework for multinational corporations and the need to institutionalize international debate on that issue (ECOSOC Res. 1721 (LIII), 28 July 1972).

19 'Business and the UNCED Process', in ECOSOC, 'Report of the Secretary-General: Follow-up to the United Nations Conference on Environment and Development as related to Transnational Corporations' (4 March 1993) UN Doc E/C.10/1993/7, which indicated that more than 900 firms were involved in the preparatory process. Gleckman, 'Transnational Corporations' Strategic Responses to "Sustainable Development"', in H. O. Bergenses, G. Parmann and Ø. B. Thommessen (eds), *Green Globe Yearbook of International Cooperation on Environment and Development* ((1995) 95.

20 *Declaration of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14/Rev.1(1972) , para. 7 ('Stockholm Declaration').

21 'Agenda 21', in *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992), Annex II, Chapter 30; ECOSOC, 'Report of the Secretary-General: Follow-up to the United Nations Conference on Environment and Development as related to Transnational Corporations' (4 March 1993) UN Doc E/C.10/1993/7, at n. 44, 35.

22 WSSD, *Political Declaration*, UN Doc. A/CONF.199/20, 26 August – 4 September 2002, Resolution 1 ('WSSD Declaration'), paras 27 and 29; and *Plan of Implementation of the World Summit on Sustainable Development*, Resolution 2, paras 49 and 140(f). The most recent UN summit on environmental law and policy (the UN Conference on Sustainable Development or Rio+20, held in Rio de Janeiro on June 2012), did not shed any new light on these questions: see discussion in Morgera and Savaresi, 'A Conceptual and Legal Perspective on the Green Economy', 22 *RECIEL* (2013) 14, at 26-27.

standards, by private companies[23] for the protection of a certain global interest or the attainment of a certain internationally agreed environmental objective.[24] This concept can be differentiated from corporate *responsibility*, which rather makes reference to the need for *substantive*, result-oriented standards for the conduct of private companies that go beyond what is required at the national level of the host state.[25] Thus, while corporate responsibility seeks to ensure corporate contributions to environmental protection and more generally to sustainable development, corporate accountability is rather concerned with *procedural* steps in that direction, in terms of transparency, disclosure of information to the public, impact assessments and consultations, and grievance mechanisms. Corporate accountability, therefore, focuses on the means for ensuring the environmentally sound conduct of multinational companies on the basis of public expectations arising from international goals and objectives.

The distinction also serves to stress that, so far, the international community has carefully and clearly refrained from using the term 'corporate *liability*'. This points to the underlying understanding that international environmental law as such is not binding on transnational corporations and consequently cannot lead to strictly legal consequences.[26] As a result, relevant international developments have focused not on issues of compensation for environmental damage, but rather on the *prevention* of multinational companies' negative impacts on environmental human rights in the country in which they are operating.

The UN General Assembly explicitly recognized the duality of corporate accountability and corporate responsibility when framing the mandate of the UN Special Representative on issues of Human Rights and Transnational Corporations in 2005.[27] Similarly to the distinction drawn above on the basis of key international

[23] Increasingly international practice related to corporate accountability avoids distinguishing multinational corporations from other business enterprises: Morgera, *Corporate Accountability in International Law*, *supra* note 3, at 60; see also Weissbrodt and Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *AJIL* (2003) 901, at 910.

24 Morgera, *Corporate Accountability in International Law*, *supra* note 3, at 19-22.

[25] *Ibid*., at 18-18.

[26] *Ibid.*, at 22-24.

[27] Commission on Human Rights, Res. 2005/69, 20 April 2005, para. 1(a) in terms of 'identify[ing] and clarify[ing] standards of corporate responsibility and accountability.'

documents on international environmental law, the Special Representative pointed to standards governing corporate 'responsibility' – understood as the *substantive* (legal, social or moral) obligations imposed on companies – and on corporate 'accountability' – understood as the *mechanisms* to hold companies to their obligations.[28] Accordingly, the Special Representative preferred the term 'corporate responsibility' to respect human rights,[29] as a substantive standard to 'do no harm' against the framework of relevant international human rights instruments, and then significantly elaborated on the underlying procedural means based on the notion of 'due diligence'.[30] The latter is defined as the '*process* whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it', based on reasonable expectations.[31]

Similarly, in the context of international environmental law, the international community has moved beyond the rejection of the idea that there are international legal obligations upon companies under international human rights law. Instead, it has recognized the 'global standard of expected conduct for all business enterprises wherever they operate' independently of states' abilities and willingness to fulfil their international obligations.[32] These international standards are in 'the process of being

---

[28] Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc. A/HRC/4/35, 19 February 2007, para. 6.

[29] Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, UN Doc. A/HRC/14/27, 9 April2010.

[30] Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc. A/HRC/8/35, 7 April 2008, paras 25 and 58 (the Human Rights Council recognised the need to operationalize the framework through Res. 8/7, 18 June 2008, para. 2).

[31] *Ibid*., para. 25 (emphasis added) and its footnote.

[32] *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights to Implement the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc. A/HRC/17/31, 21 March2011, para. 11. (The Guiding Principles were endorsed by the Human Rights Council Res. 17/4, 6 July 2011, para. 1). For a critique of this instrument, see Kamatali, 'The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is It Time for an ICJ Advisory Opinion?', 20 *Cardozo Journal of International and Comparative Law* (2011-2012) 437.

socially constructed'[33] in the face of the 'fluid' applicability of international legal principles to companies' acts[34] through the growing international activities aimed at standard-setting and monitoring of multinational corporations on the basis of 'social expectations by States and other actors'.[35] Overall, these international activities tend to 'blur the lines between [what is] strictly voluntary, and mandatory' [36] in international law with respect to the accepted corporate conduct to ensure respect for human rights.

3. Factual and Normative Linkages between Corporate Environmental Damage and Human Rights

Both the day-to-day activities of multinational companies and major accidents or incidents due to corporate sub-standard practices contribute to environmental degradation. At the same time, the financial, technological and managerial resources of private companies make them influential and creative contributors to the protection of the environment and the sustainable use of natural resources. In that respect, they can significantly contribute to support states' efforts to comply with their international environmental obligations.[37] In addition, multinational corporations that depend on the natural capital for their long-term operations ultimately have a vested interest in environmental protection.

Against this multi-faceted background, the connection between the environment and human rights in relation to corporate accountability is first and foremost factual. A survey conducted by the UN Special Representative on Business and Human Rights indicated that nearly a third of cases of alleged environmental harm had corresponding impacts on human rights. The right to health, life, adequate food and housing, minority rights to culture, as well as the right to benefit from scientific progress, and environmental concerns were raised with respect to all business

---

[33] Commission on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc. E/CN.4/2006/97, 22 February 2006, para. 55.

[34] *Ibid.*, para. 64.

[35] *Ibid.*, paras 44-46.

[36] *Ibid.,* paras 61-62.

[37] Francioni, 'The Private Sector and the Challenge of Implementation', in Dupuy and Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards*, *supra* note 4, 24, at 40.

sectors.[38] Human rights violations have often been alleged before national courts when corporate environmental damage is the result of gross negligence or deliberate indifference and caused severe, long-lasting and widespread harm on people.[39] This has been particularly the case of environmental degradation caused by multinational companies in areas traditionally occupied by indigenous peoples and local communities.[40]

From a conceptual viewpoint, the use of human rights law and approaches to address corporate environmental damage facilitates tackling the power imbalances between corporations, governments and communities, which emerge when traditional legal remedies are not sufficient to redress the damage.[41] It has been argued, for instance, that when corporations exercise 'ultimate authority' on individuals, they should be treated as duty bearers under human rights law. This usually occurs when states fail to regulate private actors because of weak government and corruption; or when corporations have so much power over government that they essentially control state decision-making.[42] In addition, international human rights law allows international scrutiny of state behaviour in situations beyond the reach of international environmental law, which is when environmental damage is not transboundary or does not have global impacts on human rights.[43] Nonetheless, neither system has 'proposed a systematic structure for approaching environmental harm to humans.'[44]

---

38 Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises - Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-related Human Rights Abuse*, UN Doc. A/HRC/8/5/Add.2, 23 March2008, para. 27.

39 Sinden, 'Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs', in McBarnet *et al*., *The New Corporate Accountability, supra* note 7*,* 728, at 744. For an analysis of relevant case law, see Osofsky, 'Learning from Environmental Justice: A New Model for International Environmental Rights', 24 *Stanford Environmental Law Journal* (2005) 71; and also Morgera, *Corporate Accountability in International Law*, *supra* note 3, at 119-141. Generally on the legal questions arising from corporate environmental harm impacting on indigenous peoples, see Foster, 'Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights', 33 *Michigan Journal of International Law* (2011-2012) 627.

40 Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya*, UN Doc. A/HRC/12/34, 15 July2009, at 19-20.

41 Sinden, 'Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs',*supra* note 39, at 731-732 and 734.

42 *Ibid*., at 741.

43 Osofsky, 'Learning from Environmental Justice: A New Model for International Environmental Rights', *supra* note 39, at 75-76.

44 *Ibid*., at 76.

While these conceptual linkages have been sufficiently addressed in the literature, little academic attention has yet been devoted to the usefulness of international environmental law in addressing human rights-related concerns about corporate conduct. Concepts and standards developed under international environmental law, and also re-elaborated in the context of international developments on corporate environmental accountability, have been increasingly taken up in the development of international standards for corporate responsibility to protect human rights. The UN Framework on Business and Human Rights, for instance, is built on a due diligence process implying concepts and approaches [45] that have been developed and/or significantly experimented with in the environmental sphere, notably: (i) impact assessment; (ii) stakeholder involvement in decision-making; and (iii) life-cycle management.[46] As this chapter will discuss, recent international developments both in standard-setting and in monitoring of corporate conduct have further drawn on international environmental law, and particularly international biodiversity law, to flesh out the due diligence process under the UN Framework. Before turning to these, however, the chapter will discuss how standards for corporate environmental accountability can in themselves contribute to corporate respect for human rights.[47]

4. The Convergence of International standards on Corporate Environmental Accountability and Their Relevance from a Human Rights Perspective

While states have generally resisted the creation of an international legally binding instrument on corporate accountability, voluntary [48] and soft-law international instruments and initiatives of inter-governmental and multi-stakeholder origin have

[45] Sinden 'Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs', *supra* note 39, at 14.

[46] E. Morgera, 'Expert Report Corporate Responsibility to Respect Human Rights in the Environmental Sphere', in *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the European Union* (European Commission-funded project), May 2010, at 12. The report is available online at http://www2.law.ed.ac.uk/euenterpriseslf/documents/files/CSREnvironment.pdf.

[47] Morgera, 'Human Rights Dimensions of Corporate Environmental Accountability', in P. M. Dupuy, U. Petersmann, and F. Francioni (eds), *Human Rights, Investment Law and Investor-State Arbitration* (2009) 511.

[48] This is notably the case of international public-private partnerships, which were endorsed as an official outcome of the World Summit on Sustainable Development in 2002. See Streck, 'The World Summit on Sustainable Development: Partnerships as the New Tool in Environmental Governance', 13 *YbIEL* (2003) 21; Morgera, *Corporate Accountability in International Environmental Law*, *supra* note 3, ch. 12.

proliferated to support and encourage the environmentally sound conduct of multinational and other companies. The inadequacy of national and international law to tackle corporate environmental damage and related human rights violations[49] motivated these developments, which have served to 'translate'[50] or 'creatively adapt'[51] international obligations drafted for and targeted to states into benchmarks to assess the conduct of business against agreed international environmental goals, objectives and principles.

A series of standard-setting exercises has been put in place by various international organizations at various points in time. In the context of the United Nations, these exercises include the ill-fated UN Draft Code of Conduct for Transnational Corporations (UN Draft Code),[52] negotiations for which collapsed in the early 1990s,[53] and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (UN Norms).[54] The latter were adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights[55] (a body comprising independent human rights experts acting in their personal capacity) but not by the former UN Commission on Human Rights.[56] The UN Norms thus only enjoy a level of expert legitimacy, but no political legitimization:[57] while

---

49 Sinden, *'Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs'*, *supra* note 39, at 730.

50 'Because the main principles of international environmental law are written for public rather than private entities, they need to be "translated' to the private sector"': Nollkaemper, 'Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives', in G. Winter (ed.), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (2006) 179, at 185.

51 With reference to human rights law in particular: Sinden, 'Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs', *supra* note 39, at 742.

52 ECOSOC, *Draft Code of Conduct on Transnational Corporations*, UN Doc. E/1990/94, 12 June 1990.

53 Sprote, 'Negotiations on a United Nations Code of Conduct on Transnational Corporations', 33 *German Yearbook of International Law* (1990) 331, at 339.

54 ECOSOC, *Commentary to the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, 26 August 2003.

55 ECOSOC, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

56 The Commission did not adopt, but only *took note* of the Norms, stating that they had 'not been requested by the Commission and, as a draft proposal, ha[d] no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard.' Office of the High Commissioner for Human Rights, *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/DEC/2004/116, 20 April 2004 (2004), para. C.

57 See Walker's contribution in United Nations Research Institute for Social Development, *Corporate Social Responsibility and Development: Towards a New Agenda: Summaries of Presentations*

they may be considered superseded by the UN Framework on Business and Human Rights, the UN Norms still provide useful historical indications on the cross-fertilization of international human rights and environmental law in relation to corporate accountability. Relevant instruments also include the intergovernmentally approved and highly influential Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD), the partnership-focused principles of the UN Global Compact[58] (an initiative of the UN Secretary-General with support from various UN bodies)[59] and the Performance Standards of the World Bank's International Finance Corporation (IFC).[60]

From earlier and successive international discussions, a series of common standards have emerged that have reached a significant level of detail and acceptance at the international level as directly applicable to private companies.[61] In the early 2010s, this trend even accelerated. On the occasion of the 2011 parallel review of the OECD Guidelines and the IFC Standards (motivated mostly by the need to take into account the adoption of the UN Framework on Business and Human Rights), further convergence has occurred in the procedural standards for corporate environmental accountability, with common substantive standards having been introduced.[62]

Made at the UNRISD Conference (Geneva, 17-18 November 2003), at 85, available online at http://www.unrisd.org/80256B3C005BD6AB/(httpEvents)/3B9E23F717B84550C1256E23004DAB40?OpenDocument.

[58] The website of the Global Compact can be found at http://www.unglobalcompact.org/Portal/Default.asp. See also *United Nations Guide to the Global Compact: A Practical Understanding of the Vision and the Nine Principles,* at 58, on file with author.

[59] In time, the Global Compact received an intergovernmental endorsement through GA Res. 62/211 (2007), 'Towards Global Partnership' , para. 9, and GA Res. 64/223 (2009), 'Towards Global Partnership', para. 13. The question of the intergovernmentally agreed mandate of the Global Compact remains open, however. See the Joint Inspection Unit, United Nations Corporate Partnerships,*The Role and Functioning of the Global Compact*, UN Doc. JIU/REP/2010/9 (2010), paras 13-18 and recommendation 1; and 'A Response from the Global Compact Office', 24 March 2011, http://unglobalcompact.org/docs/news_events/9.1_news_archives/2011_03_24/gco_jiu_response.pdf, at 2.

[60] IFC, *IFC Performance Standards on Social and Environmental Sustainability*, 1 January 2012available at http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_pps ('2012 IFC Performance Standards').

[61] This is the main finding of Morgera, *Corporate Accountability in International Environmental Law*, *supra* note 3, at 200-201.

[62] Morgera, 'From Corporate Social Responsibility to Accountability Mechanisms', *supra* note 4.

For present purposes, it should be emphasized that the resulting international standards for corporate environmental accountability already imply certain human rights dimensions. This is, for instance, the case of the environmental impact self-assessment, namely the ongoing assessment, beyond legal requirements at the national level, of the possible environmental impacts of private companies' activities before and during their operations, on the basis of scientific evidence, as well as communication with likely-to-be-affected communities.[63] On the basis of such continuous assessment, private companies are further to elaborate environmental management systems to assist in controlling direct and indirect impacts on the environment and possibly to continually improve their environmental performance.[64] Through the assessment process, the human rights issues related to the conditions under which natural resources are acquired and processed can come into focus, although the full spectrum of relevant human rights issues (such as labour standards and working conditions) are less likely to be considered.[65] Stakeholder engagement and participation in the assessment – elements common to human rights assessments[66] – also significantly contribute to integrating into the environmental self-assessments human rights concerns, particularly those of local and indigenous communities.[67]

Corporate environmental accountability standards also include prevention (whereby private companies are expected to take reasonably active steps, including the suspension of certain activities to prevent or minimize environmental damage[68]) and the application of the precautionary principle (whereby, in the face of scientific uncertainty, private companies are further expected to undertake precautionary action

[63] Commentary UN Norms, *supra* note 54, sections (b) and (c); OECD Guidelines,*supra* note 2, ch. VI, para 3; *IFC Performance Standards on Social and Environmental Sustainability*, *supra* note 60, Performance Standard 1,, *supra* note 60, paras 5-7.

[64] OECD Guidelines, *supra* note 2, chapter VI, para. 1 and Commentary on the OECD Guidelines, para. 60; Commentary UN Norms, *supra* note 55, section (g); *2012 IFC Performance Standards on Social and Environmental Sustainability*, *supra* note 60, Performance Standard 1, paras 17 and 24.

[65] However, human rights questions related to natural resources appear to be more neglected in human rights-focused assessments: International Business Leaders Forum, International Finance Corporation and UN Global Compact, *Guide to Human Rights Impact Assessment and Management Road-Testing Draft* (2007), at 29.

[66] O. Lenzen and M. d'Engelbronner, *Guide to Corporate Human Rights Impact Assessment Tools* (2009).

[67] International Business Leaders Forum *et al*., *Guide to Human Rights Impact Assessment and Management*, *supra* note 65, at 4 and 16.

[68] OECD Guidelines, *supra* note 2, ch. VI, para 5; *IFC Performance Standards on Social and Environmental Sustainability*, *supra* note 60, Performance Standard 3; implicitly, Principle 10 of the Global Compact (*Guide to the Global Compact*, *supra* note 58, at 64); Commentary UN Norms, *supra* note 54, sections (e)-(g).

by taking the most cost-effective early action to prevent the occurrence of environmental harm, or by avoiding delays in minimizing such harm[69]). Both standards are alien to international human rights law, but may serve to prevent or contain environmental harm which would have human rights consequences.[70]

Disclosure of public information,[71] direct consultations with the public,[72] and the creation of a review or appeal process for communities to express their complaints[73] are complementary and mutually reinforcing procedural standards. These procedural standards have been significantly strengthened by the 2011 reviews of the OECD Guidelines and of the IFC Performance Standards, although discrepancies have emerged in relation to the right to prior informed consent of indigenous peoples.[74] The OECD Guidelines emphasize good faith consultations for planning and decision-making concerning projects or activities 'that may significantly impact local communities' such as those involving the intensive use of land and water, as well as disclosure of climate change and biodiversity-specific information.[75] On the other hand, the IFC significantly strengthened its approach to community consultations, linking the need for companies to conduct 'informed consultation' with a specific and

[69] Principle 7 of the Global Compact and *Guide to the Global Compact*, *supra* note 58, at 54; OECD Guidelines, *supra* note 2, ch. VI, para. 4; UN Norms, *supra* note 55, section G.

[70] Precaution has recently been invoked in the context of the reflection by the UN Special Rapporteur on the Rights of Indigenous Peoples on corporate accountability: Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc. A/HRC/21/47, 6 July 2012, para. 52; and in UN Global Compact Office, *United Nations Declaration on the Rights of Indigenous Peoples: A Business Reference Guide*, Exposure Draft, 10 December 2012, at 76, available at http://www.unglobalcompact.org/docs/issues_doc/human_rights/UNDRIP_Business_Reference_Guide.pdf.

[71] UN Draft Code, *supra* note 52, para 42; *Guide to the Global Compact*, *supra* note 58, at 58; Commentary UN Norms, *supra* note 55, sections (b) and (c); *2012 IFC Performance Standards, supra* note 60, Performance Standard 1, para. 29; OECD Guidelines, *supra* note 2, ch. VI, para 2.

[72] *Guide to the Global Compact*, *supra* note 58, at 58; OECD Guidelines, *supra* note 2, ch. VI, para. 2; *2012 IFC Performance Standard*, *supra* note 60, Performance Standard 1, paras 30-33.

[73] *2012 IFC Performance Standards*, *supra* note 60, Performance Standard 1, para. 35.

[74] The lack of reference to prior informed consent in the revised OECD Guidelines was criticised by OECD Watch, 'OECD Watch Statement on the Update of the OECD Guidelines for Multinational Enterprises: Improved Content and Scope, but Procedural Shortcomings Remain', 25 May 2011, available at http://oecdwatch.org/publications-en/Publication_3675 ; and by Amnesty International, 'The 2010-11 Update of the OECD Guidelines for Multinational Enterprises Has Come to an End: The OECD Must Now Turn [in]to Effective Implementation', 23 May 2011, available at http://www.amnesty.org/en/library/asset/IOR30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior300012011en.pdf.

[75] OECD Council, 'OECD Council, 'OECD Guidelines for Multinational Enterprises: Update 2011 – Note by the Secretary-General', OECD Doc. C(2011)59, 3 May 2011, Appendix II, para II. A.14; OECD Council, 'OECD Guidelines for Multinational Enterprises: Update 2011 – Commentaries', OECD Doc. C(2011) 59/ADD1, 3 May 2011, paras 25 and 33.

express (albeit qualified) requirement for prior informed consent. Prior informed consent specifically needs to be obtained from IFC clients in three cases: potential relocation of indigenous peoples, impacts on lands and natural resources subject to traditional ownership or under customary use, and projects proposing to use cultural resources for commercial purposes.[76] The IFC has in this connection engaged in 'translating' the concept of prior informed consent for private companies: it is a good-faith negotiation with culturally appropriate institutions representing indigenous peoples' communities, with a view to reaching an agreement that is seen as legitimate by the majority within the community.[77]

The IFC Performance Standards further clarify explicitly that 'consent does not necessarily require unanimity and may be achieved even when individuals and sub-groups explicitly disagree'.[78] This appears to be in line with the understanding of prior informed consent proposed by the UN Special Rapporteur on indigenous peoples' rights. Prior informed consent does not provide indigenous people with a veto power when the state acts legitimately and faithfully in the public interest, but rather 'establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned'.[79] In addition, the IFC Performance Standards require, in qualified language 'consider[ation] … where appropriate' of involving representatives of affected communities in monitoring the effectiveness of companies' environmental management programmes,[80] coupled with the creation of an 'external communications system' that will allow companies to screen, assess and reply to communications from stakeholders with a view to continually improving their management system. The system is then subject to the requirement for a 'stakeholder engagement framework' in the event that the exact location of the project is unknown but the project is nonetheless reasonably expected to have significant impacts on local communities. When communities may be affected by risks of adverse impacts of the project, the following information should be disseminated to affected communities: purpose, nature and scale of the project; duration of proposed project activities; risks and potential impacts on communities

[76] *2012 IFC Performance Standards*, *supra* note 60, Performance Standard 1, para. 35.
[77] *Ibid.*, Performance Standard 7, para. 15.
[78] *Ibid*.
[79] *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc. A/HRC/12/34, *supra* note 40, paras 48 and 53.
[80] *2012 IFC Performance Standards*, *supra* note 60, Performance Standard 1, para. 21.

and relevant elements of the management programme; envisaged stakeholder engagement process; and the grievance and redress mechanism.[81]

These procedural standards equally target environmental protection and respect of human rights. What has been more difficult to determine, in the evolution of international standard-setting on corporate environmental accountability, is a substantive standard for corporate environmental responsibility. Only the IFC standards attempted to identify a standard such as sustainable natural resource management[82] and respect for internationally protected sites.[83] The 2011 reviews, however, introduced references to climate change, biodiversity and resource efficiency as substantive standards of corporate environmental responsibility. The 2011 version of the OECD Guidelines did so in a more timid way, with a recommendation on 'exploring and assessing ways to improve environmental performance' with reference to emission reduction, efficient resource use, the management of toxic substances and the conservation of biodiversity.[84] The 2011 version of the IFC Performance Standards, on the other hand, introduced very detailed standards on greenhouse gas emissions,[85] water consumption and waste reduction,[86] and on the protection of natural habitats and ecosystem services.[87] These substantive standards of corporate environmental responsibility are particularly (albeit implicitly) relevant, as human rights violations or negative impacts have been increasingly

[81] *Ibid*., paras 26 and 30-31 and 38.

[82] The earlier version of the IFC Performance Standards *IFC Performance Standards on Social and Environmental Sustainability*, 30 April 2006 ('2006 IFC Performance Standards'), Performance Standard 1, fn. 7) made reference to 'sustainable resource management' as 'the use, development and protection of resources in a way or at a rate that enables people and communities to provide for their present social, economic and cultural well-being while also sustaining the potential of those resources to meet the reasonably foreseeable needs of future generations' (cf. *2012 IFC Performance Standards*, *supra* note 60, Standard 6).

[83] *2006 IFC Performance Standards, supra* note 60, Performance Standard 6. For a more detailed discussion on these substantive standards, see Morgera, *Corporate Accountability in International Environmental Law*, *supra* note 3, ch. 8.

[84] OECD Guidelines, chapter VI, para 6.d.

[85] Such as 'technical and financially feasible and cost-effective options to reduce project-related greenhouse gas emissions during the design and operation of the project', as well as more specific obligations in case of projects expected or actually producing more than 25,000 tonnes of carbon-dioxide equivalent annually: *2012 IFC Performance Standards, supra* note 60, Performance Standard 3, paras 7-8.

[86] This includes checking whether contractors for the disposal of hazardous waste are reputable and legitimately licensed and their sites are operated in a manner consistent with acceptable standards. IFC clients must also consider whether they should develop their own recovery or disposal facilities at the project site. Further, they are subject to the prohibition to purchase, store, manufacture, use or trade in products classified as extremely hazardous or highly hazardous by the World Health Organisation: *Ibid*., paras 9, 12 and 17.

[87] *Ibid*., Performance Standard 6.

discussed internationally in relation to waste[88] and climate change.[89] The standards related to biodiversity, in turn, provide specific human rights dimensions: stakeholders' views need to be taken into account on the extent of conversion or degradation, and the identification and protection of 'set-aside areas'.[90] Furthermore, business entities are called upon to determine with stakeholder participation likely adverse impacts on ecosystem services, and systematically identify priority ecosystem services (either those in relation to which the project will have adverse impacts on affected communities or on which the project will be directly dependent for its operations). These exercises are aimed at avoiding or minimizing negative impacts, and implementing measures to increase the resource efficiency of the operation.[91]

Overall, international standards for corporate environmental accountability serve various functions. They enhance the process of project review by expanding the substantive criteria applicable to risk assessment and creating additional layers of corporate compliance beyond national law and possibly also beyond international treaties to which the host state is a party.[92] Further, they provide additional grounds for stakeholders' complaints and advocacy campaigns that would not otherwise appear sound at the national or international level.[93] From the viewpoint of corporations, international standards have a significant and growing 'commercial relevance' in light of the increasing number of direct commitments of private companies to key provisions or goals of multilateral environmental agreements, and their direct involvement in international standard-setting on corporate environmental accountability.[94]

---

[88] See the reports of the UN Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights: http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx.

[89] Human Rights Council, Resolutions on 'Human Rights and Climate Change': Res. 7/23, 28 March 2008; Res. 10/4, 25 March 2009; and Res. 18/22, 17 October 2011.

[90] *2012 IFC Performance Standards*, *supra* note 60, Performance Standard 6, para. 14 and fn. 10.

[91] *Ibid.*, paras 24-25.

[92] Meyerstein, 'Global Adversarial Legalism: The Private Regulation of FDI as a Species of Global Administrative Law', in M. Audit & S. Schill (eds), *The Internationalisation of Public Contracts* (forthcoming 2013).

[93] *Ibid.*

[94] Affolder, 'The Market for Treaties', 11 *Chicago Journal of International Law* (2010) 159, at 186.

5. Cross-fertilization between Environmental and Human Rights-related Efforts in Ensuring Corporate Accountability

Increasingly, international standard-setting and monitoring activities related to corporate accountability have relied on conceptual and normative developments under international environmental law, and in particular under the Convention on Biological Diversity, to further develop and effectively apply human rights-related international standards to multinational enterprises. In particular, the Convention on Biological Diversity (CBD) has provided normative standards as well as practical tools to 'translate' the concepts of sustainable use and the protection of indigenous peoples and local communities[95] into workable benchmarks for the private sector. This is, in particular, the case of environmental-cultural impact assessments and benefit-sharing.[96] The CBD guidelines are particularly noteworthy because they have been negotiated with the participation of stakeholders and representatives of indigenous and local communities[97] and approved inter-governmentally[98] by the CBD's virtually

[95] Although the soft law instruments developed under the Convention always refer to 'indigenous and local communities', the inappropriate use of this terminology to reflect international human rights developments related to indigenous peoples has already been pointed out by the UN Forum on Indigenous Issues (e.g., *Report of the Tenth Session of the UN Permanent Forum on Indigenous Issues*, UN Doc. E/2011/43-E/C.19/2011/14, 16-27 May 2011, paras 26-27) but CBD parties have not yet reached consensus on adopting the term 'indigenous peoples and local communities.' The question was discussed most recently by the COP in 2012 and eventually postponed for consideration in 2014, following consideration of 'all its implications for the Convention on Biological Diversity and its Parties' (*Recommendations to the Convention on Biological Diversity Arising from the Ninth and Tenth Sessions of the United Nations Permanent Forum on Indigenous Issues*, CBD Decision XI/14G, 5 December2012, para. 2).

[96] Although the concept of benefit-sharing has been enshrined in international law since the late 1950s (such as in the 1957 Interim Convention on Conservation of North Pacific Fur Seals, as argued by Proelß, 'Marine Mammals', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010), available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1189?rskey=t1xQHR&result=4&q=&prd=EPIL, para. 10; *Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3, Art. 140(2); *Declaration on the Right to Development*, UN GA Res. 41/128, 4 December 1986, Art. 2(3); and the *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, 28 *ILM* (1989) 1382, Art. 15(2)), it is in the context of the CBD that is has been more fully developed.

[97] Under the CBD Working Group on Art. 8(j) ('traditional knowledge') in particular, the fullest possible participation of indigenous and local communities is ensured in all Working Group meetings, including in contact groups, by welcoming community representatives as Friends of the Co-Chairs, Friends of the Bureau and Co-Chairs of contact groups; without prejudice to the applicable rules of procedure of the Conference of the Parties establishing that representatives duly nominated by parties are to conduct the business of CBD meetings so that any text proposal by indigenous and local communities' representatives must be supported by at least one party. Conference of the Parties to the Convention on Biodiversity, *Report of the Seventh Meeting of the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions*, UN Doc. UNEP/CBD/COP/11/7, 24 November 2011, para. 20.

[98] By the Convention Conference of the Parties ('COP') – the Convention currently counts 193 States as parties. On the legal significance of COP decisions generally, see Brunnée, 'COPing with Consent: Law-making under Multilateral Environmental Agreements', 15 *Leiden Journal of International Law*

universal membership.[99] In that respect, the CBD has provided quite an effective and timely forum where inter-governmental consensus is reached on instruments that promote a rights-based approach to environmental policy, including in relation to corporate accountability.[100] The cross-fertilization between international biodiversity and human rights law can be seen as a significant contribution to ensuring substantive unity[101] across different areas of international law that may be negatively affected by the conduct of private operators.[102]

For instance, the 2012 Performance Sustainability Standards of the International Finance Corporation relied on the CBD and the concept of benefit-sharing as a key link between the right to prior informed consent of indigenous peoples[103] and due diligence by private companies.[104] Private companies are called upon to put mitigation measures into place, such as compensation and benefit-sharing, taking into account indigenous peoples' laws, institutions and customs. Benefits may include, according to the preferences of the relevant indigenous peoples, culturally-appropriate improvement of their standard of living and livelihoods and the long-term sustainability of the natural resources on which they depend.[105] Benefit-sharing is further envisaged where the business entity 'intends to utilise natural resources that are central to the identity and livelihood of Indigenous People and their usage thereof exacerbates livelihood risk'.[106] With specific regard to involuntary resettlement, IFC clients are expected to implement measures to ensure, for communities with natural resource-based livelihoods, the continued access to affected resources or alternative resources with equivalent livelihood-earning potential and accessibility. In the

(2002) 1; and on the significance of CBD COP decisions, see Morgera, 'Far Away, So Close: A Legal Analysis of the Increasing Interactions between the Convention on Biological Diversity and Climate Change Law', 2 *Climate Law* (2011) 85.

[99] With the notable exception of the United States; see status of the CBD membership at: http://www.cbd.int/information/parties.shtml.

[100] Morgera and Tsioumani, 'Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity', 21 *YbIEL* (2011) 4.

[101] P. M. Dupuy, *L'unité de l'ordre juridique international* (2003).

[102] Morgera, 'From Corporate Social Responsibility to Accountability Mechanisms', *supra* note 4, at 322.

[103] *UN Declaration on the Rights of Indigenous Peoples* ('UNDRIP'), UN GA Res. 61/295, 13 September 2007.

[104] In the previous version of the IFC Performance Standards the concept of benefit-sharing was only relied upon in the context of cultural heritage: *2006 IFC Performance Standards*, *supra* note 82, Performance Standard 8.

[105] *2012 IFC Performance Standards*, *supra* note 60, Performance Standard 7, paras 12-13.

[106] *Ibid.*, para. 18.

alternative, IFC clients are to provide compensation and benefits associated with the natural resource use that 'may be collective in nature rather than directly oriented towards individuals and households', taking into account the ecological context.[107]

In parallel, the UN Rapporteur on Indigenous Peoples' Rights pointed to the need to complement the UN Framework on Business and Human Rights with an environmental dimension to ensure the protection of the rights of indigenous peoples.[108] To that end, he indicated that concepts such as benefit-sharing and socio-cultural and environmental impact assessments, as elaborated upon under the CBD,[109] can significantly contribute to fleshing out standards of due diligence according to the UN Framework on Business and Human Rights.[110] He also stressed that in addition to entitlement to compensation, indigenous peoples have a right to share in the benefits arising from business activities taking place on their traditional lands or in relation to their traditionally used natural resources.[111] And further, consensus-driven consultation processes should not only address measures to mitigate or compensate for adverse impacts of projects, but also explore and arrive at means of equitable benefit-sharing in a spirit of true partnership.[112] Along similar lines, the Expert Mechanism on the Rights of Indigenous Peoples stressed the link between prior informed consent, benefit-sharing and mitigation measures in the context of large-scale natural resource extraction on indigenous peoples' territories, underscoring the importance of the CBD work programme on protected areas[113] and the Akwé: Kon Guidelines on socio-cultural and environmental impact assessments.[114]

---

[107] Ibid., Performance Standard 5, para. 26.
[108] *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, UN Doc. A/HRC/12/34, *supra* note 40, Section E.
[109] The socio-cultural and environmental impact assessments were elaborated upon through *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or Which Are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, CBD COP 7 Decision VII/16F, 13 April 2004.
[110] Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, James Anaya, UN Doc. A/HRC/15/37, 19 July 2010, paras 73-75.
[111] *Ibid*., paras 76-80.
[112] *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, UN Doc. A/HRC/12/34, *supra* note 40, paras 48 and 53.
[113] 'Programme of Work on Protected Areas', in *Protected Areas (Arts 8 (a) to (e))*, CBD COP Decision VII/28, 13 April 2004, Annex.
[114] *Expert Mechanism on the Rights of Indigenous Peoples, Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-making*, UN Doc. A/HRC/15/35, 23

With regard to monitoring activities, the implementation procedure of the OECD Guidelines for Multinational Enterprises has provided recent instances in which CBD concepts have been used to interpret the more general standards of corporate responsibility to respect human rights contained in the Guidelines. The UK National Contact Point used the CBD Akwé: Kon Guidelines to interpret the OECD Guidelines provisions on consultations on environmental impacts, and determined on that basis that a mining company did not employ the local language or means of communication other than the written form for consultations with communities with very high rates of illiteracy.[115] Significantly, it further explicitly underlined that in carrying out a human rights impact assessment, as suggested by the UN Framework on Business and Human Rights, the Akwé: Kon Guidelines could be used as a point of reference, particularly for carrying out impact assessments on indigenous groups.[116] Confirmation of the relevance of the CBD Akwé: Kon Guidelines for the appropriate identification of and consultation with indigenous peoples has also emerged from other recommendations under the OECD Guidelines implementation procedure.[117]

Benefit-sharing and socio-cultural environmental impact assessments, as developed under the CBD, have therefore served to tighten the link between corporate environmental accountability and the human rights of indigenous peoples that can be negatively impacted by extractive industries. They provide flexible and detailed procedures to uphold the recognition of indigenous peoples' rights to self-determination and to permanent sovereignty over their lands and resources; and to operationalize their right to free, prior informed consent with regard to approval of the use by private industries of indigenous lands, territories and resources. More uniform and detailed procedures in that regard appear particularly useful as 'national practice remains sporadic and inconsistent' in relation to indigenous peoples' right to prior

August2010); and *Report of the Expert Mechanism on the Rights of Indigenous Peoples on Its Third Session,* UN Doc. A/HRC/15/36, 23 August 2010.

[115] UK NCP, *Final Statement on the Complaint from Survival International against Vedanta Resources plc*, 25 September 2009, paras 44-46, available at: http://www.oecd.org/corporate/mne/43884129.pdf.

[116] *Ibid*., para. 79.

[117] Norwegian National Contact Point, *Final Statement: Complaint from* The Future in Our Hands *(FIOH) against* INTEX Resources ASA *and the Mindoro Nickel Project,* January 2012, available at http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/Norwegian%20NCP%20intex_final.pdf, at 48.

informed consent.[118] At the same time, it has been recognized that culturally appropriate and effective consultations[119] and free prior informed consent are necessary to define arrangements for sharing benefits arising from private investments so as to ensure accord with indigenous peoples' own understanding and preferences.[120]

Benefit-sharing and socio-cultural environmental impact assessments thus appear as two of the interlinked procedural safeguards[121] that underpin corporate respect for the substantive rights of indigenous peoples potentially or actually impacted by extractive activities in or near their lands. These safeguards are considered essential means for corporate accountability vis-à-vis the exercise of indigenous peoples' substantive right to property, culture, religion and non-discrimination, their right to health and physical well-being, as well as their right to set and pursue their own priorities for development, including the development of natural resources, as part of their right to self-determination.[122] In particular, socio-cultural environmental impact assessments constitute an indispensable precondition to the process of obtaining prior informed consent; whereas benefit-sharing represents the concrete outcome of that process. These safeguards are expected to apply to operations that take place within the officially recognized or customary land use areas of indigenous peoples, or to any extractive activity that has a direct bearing on areas of cultural significance, or on natural resources traditionally used by indigenous peoples, in ways that are important for their survival.[123] Under these safeguards, companies are expected to defer to indigenous decision-making processes on terms for compensation, mitigation measures and benefit-sharing proportionate to the impact of the proposed development, with a view to leading to new business models involving genuine

[118] Meyerstein, *supra* note 92.
[119] Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, *Follow-up Report on Indigenous Peoples and the Right to Participate in Decision-making with a Focus on Extractive Industries*, UN Doc. A/HRC/21/55, 16 August 2012.
[120] *Ibid.*, para. 43; see also *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc. A/67/301, 13 August 20122012), para. 78.
[121] *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc. A/HRC/21/47, *supra* note 70, , paras 49-53.
[122] The identification of substantive rights can be found in *ibid*., para. 50.
[123] *Ibid*., para. 65.

partnership between private companies and indigenous peoples that are in keeping with indigenous peoples' rights and priorities for development.[124]

6. Benefit-sharing: The Need for Further Research

While socio-cultural environmental assessments and benefit-sharing have equally played a role in the cross-fertilization of international biodiversity law and human rights in relation to corporate accountability, it is the latter concept in particular that deserves further attention.[125] Benefit-sharing[126] is employed in a variety of international legal instruments in relation to the environment and to human rights[127] for the equitable distribution of economic and non-economic benefits among states, or between governments and indigenous peoples and local communities. This legal concept, however, is still not well understood and is little-implemented[128] as a regulatory approach to address environmental sustainability and equity concerns of developing countries and of indigenous peoples and local communities. In particular, benefit-sharing as a tool for corporate environmental accountability and corporate responsibility to respect human rights remains to be further and systematically explored. This section will discuss preliminary findings on the legal nature and practical significance of benefit-sharing in international environmental and human rights law with a view to identifying open questions related to corporate accountability.

Notwithstanding the presence of benefit-sharing in various other areas of international law, it has received the most attention under the CBD, where this notion has been significantly developed through soft and hard law instruments into a comprehensive

[124] *Ibid*., para. 68.
[125] And indeed socio-cultural environmental assessments are a means to ensure benefit-sharing, notably: benefit-sharing is seen as the outcome of socio-cultural environmental impact assessments as compensation for possible negative impacts on indigenous peoples and local communities (*Akwé: Kon Voluntary Guidelines*, *supra* note 109, paras 46 and 56).
[126] I am grateful to Annalisa Savaresi and Elsa Tsioumani for their useful comments on this part of the chapter.
[127] See *supra* note 96.
[128] As documented for instance in 2009 in relation to protected areas, *In-depth Review of the Implementation of the Programme of Work on Protected Areas*, UN Doc. UNEP/CBD/SABSTTA/14/5, 14 January 2010, at 8-9.

notion related to access to genetic resources [129] as well as the creation and management of protected areas, [130] the sustainable use of forests, [131] mountain ecosystems [132] and other natural resources. [133] In all these contexts, benefit-sharing seeks to ensure the equitable allocation among different stakeholders (state and non-state actors) of economic and socio-cultural and environmental advantages arising from the use of natural resources or from resource-related regulation. By promoting environmental sustainability and equity at the same time, benefit-sharing aims to balance the need to reward and support 'nature stewards' as providers of global public goods, to account for the special needs of developing countries and of poor and marginalized communities, and to allow for diverse cultural systems as a basis for genuine dialogue and lasting cooperation.

As developed under the CBD, benefit-sharing entails two conceptually different dimensions: an inter-state one and an intra-state one – that is, benefit-sharing is understood both as a tool for ensuring equity in relations among states as such, as well as relations between states and indigenous peoples or local communities.[134] As to the former dimension, the text of the Convention already indicates that benefit-sharing can be implemented through technology transfer, funding, the sharing of research findings, and scientific collaboration among states that provide and obtain access to genetic resources.[135] Subsequent normative developments under the CBD taken as a whole indicate that benefit-sharing is seen more broadly as the basis for inter-state

[129] CBD Arts 1 and 15; and *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*, CBD Decision VI/24, 27 May 2002.
[130] 'Programme of Work on Protected Areas', *supra* note 113, programme element 2 titled 'Governance, Participation, Equity and Benefit-Sharing' (in particular, paras 2.1.3-2.1.5).
[131] *Expanded Programme of Work on Forest Biological Diversity*, CBD COP Decision VI/22, 7-19 April 2002, paras 13, 19(h) and 34, as well as Activities (b) and (f) under Objective 1.
[132] *Work Programme on Mountain Biodiversity, in Mountain Biological Diversity*, CBD decision VII/27, 13 April 2004, Annex, paras 1.3.2-1.3.4, 1.3.7 and 219.
[133] 'Addis Ababa Principles and Guidelines for the Sustainable use of Biodiversity', in *Sustainable Use (Art. 10)*, CBD COP Decision VII/12, 13 April 2004, Annex II; Operational Guidelines to Principle 4; *Principles of the Ecosystem Approach, in Ecosystem approach*, CBD Decision V/6, 22 June 2000, Annex B, Operational Guidance 2, para. 9; and 'Refinement and Elaboration of the Ecosystem Approach, Based on Assessment of Experience of Parties in Implementation', in *Ecosystem Approach*, CBD Decision VII/11, 13 April 2004, Annex I, Principle 4 and paras 2.1.3-2.1.5.
[134] These two dimensions already emerge (albeit not very clearly) from the text of the Convention: compare the reference to benefit-sharing in CBD Arts 1 and 15, on the one hand, and in Art. 8(j) on the other. This is discussed in more detail in Morgera and Tsioumani, 'The Evolution of Benefit Sharing', *supra* note 5.
[135] CBD Arts. 16, 19 and 20. This is discussed in more detail in Morgera and Tsioumani, 'The Evolution of Benefit Sharing', *supra* note 5, at 153-154.

cooperation not only at genetic level but also at ecosystem and species level.[136] This is significant because benefit-sharing appears capable of operating not only in situations of exchange (when states have a self-interest in obtaining access to other states' genetic resources),[137] but also when states pursue cooperation in delivering a global benefit arising from the protection or sustainable use of biological resources that remain within the third state (common concern of humankind).[138]

Furthermore, the normative developments under the CBD suggest that *within* states, benefit-sharing is seen by the international community not only as a reward for indigenous and local communities that share with governments or private entities traditional knowledge associated with genetic resource use.[139] It is also seen as a guarantee of the full and effective participation of communities and of respect for their substantive rights in decision-making regarding the conservation or sustainable use of biological resources. It further aims to compensate the negative impacts on community livelihoods of natural resource development, including when foreign direct investment is concerned.[140] To these ends, benefit-sharing may entail legal recognition of traditional ownership or access to lands, support for continued sustainable customary use, or opportunities for shared management of natural resources. It may also entail the provision of guidance (such as training or capacity-building) to improve the environmental sustainability of community practices, and the

[136] Most of the academic literature has concentrated only on inter-State benefit-sharing in relation to access to genetic resources: e.g., Coombe, 'Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by Recognition of Indigenous Knowledge and the Conservation of Biodiversity', 6 *IJGLS* (1998) 59; E.C. Kamau and G. Winter (eds), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing* (2009). Non-legal scholars have analysed benefit-sharing as a form of redistribution politics (e.g., Hayden, 'Taking as Giving: Bioscience, Exchange, and the Politics of Benefit-Sharing', 37 *Social Studies of Science* (2007) 729), but this expansive approach has never been applied beyond access to genetic resources and has not been picked up by international environmental law research.

[137] On questions of good faith under the CBD Nagoya Protocol on Access to Genetic Resources and Benefit-sharing, see E Morgera, E. Tsioumani and M. Buck, *Commentary on the Nagoya Protocol on Access and Benefit-Sharing* (Martinus Nijhoff, forthcoming).

[138] Brunnée, 'Common Areas, Common Heritage and Common Concern', in D. Bodansky, J. Brunnée and E. Hey (eds), *Oxford Handbook of International Environmental Law* (2007) 550.

[139] This dimension has been significantly developed through the adoption of the *Nagoya Protocol on Access and Benefit-sharing*, which spells out the international obligations of States towards indigenous communities: Arts 5(1)-(2), 6(2), 7, 12 and 16. See generally, Smagadi, 'Analysis of the Objectives of the Convention on Biological Diversity - Their Interrelation and Implementation Guidance for Access and Benefit Sharing', 31 *Colum. J. Envtl. L.* (2006) 243 and Savaresi, 'The International Human Rights Implications of the Nagoya Protocol' *supra* note 15.

[140] Morgera and Tsioumani, 'The Evolution of Benefit Sharing', *supra* note 5, at 159-165.

proactive identification of opportunities for alternative livelihoods.[141]

While the distinction among/within states constitutes a useful starting point, it must be conceded that there are conceptual difficulties in detaching one dimension from the other. On the one hand, inter-state benefit-sharing may indirectly support indigenous peoples or local communities: this is the case of an international mechanism collecting payments globally and allocating funding to farmers in developing countries under the International Treaty on Plant Genetic Resources for Food and Agriculture.[142] On the other hand, intra-state benefit-sharing may involve inter-state relations in the form of development cooperation benefiting indigenous peoples and local communities.

Significantly for present purposes, the role of the private sector is relevant both in relations among and within states,[143] and indeed the various CBD guidelines that contributed to delineating the evolving notion of benefit-sharing are framed so as to also directly address private companies.[144] As to inter-state benefit-sharing, private operators are expected to share benefits including through technology transfer with developing countries.[145] As to intra-state benefit-sharing, private investors are expected to share returns with indigenous and local communities, offer job

[141] *Ibid*.
[142] International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR), Rome, 3 November 2001; and ITPGR Secretariat Press Release, 'Board of Plant Treaty Announces New Benefits for Farmers In 11 Developing Nations, as Efforts Heat Up To Protect Valuable Food Crops In Face Of Threatened Shortages, Climate Change' (undated), available at <ftp://ftp.fao.org/ag/agp/planttreaty/news/news0009_en.pdf>. Morgera and Tsioumani, 'The Evolution of Benefit Sharing', *supra* note 5, at 158-159.
[143] I am grateful to Dr James Harrison, University of Edinburgh School of Law, for drawing my attention to this point.
[144] Although they are directed to Parties and governments, the *Akwé: Kon Voluntary Guidelines*, *supra* note 109 (para. 1), are expected to provide a collaborative framework for governments, indigenous and local communities, decision makers and managers of developments (para. 3). *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity*, *supra* note 133, para. 1 clarifies that '[T]he principles provide a framework for advising Governments, resource managers, indigenous and local communities, the private sector and other stakeholders about how they can ensure that their use of the components of biodiversity will not lead to the long-term decline of biological diversity.' 'International Guidelines for Activities Related to Sustainable Tourism Development in Vulnerable Terrestrial, Marine and Coastal Ecosystems and Habitats of Major Importance for Biological Diversity and Protected Areas, Including Fragile Riparian and Mountain Ecosystems', in *Biological Diversity and Tourism*, CBD COP Decision VII/14, , 13 April 2004, Annex, para. 2 clarifies that the Guidelines provide a framework for addressing what the proponent of new tourism investment or activities should do to seek approval, as well as technical guidance to managers with responsibility concerning tourism and biodiversity.
[145] Bonn Guidelines, *supra* note 129, para. 6(b).

opportunities to them or support co-management options.[146]

Notwithstanding these significant developments, the scope and implications of benefit-sharing remain surprisingly unclear both in policy and in academic debates. State parties to the CBD agreed to launch a study on benefit-sharing in 2012.[147] In the meantime, academics continue to discuss exactly what benefit-sharing entails, how it will apply and whether there is just one benefit-sharing concept or many.[148] This uncertainty may be regarded, on the one hand, as the result of the limited academic reflection on the overall scope of benefit-sharing and broad implications of its ubiquity within and across international environmental regimes, and on the other hand, as the result of the fragmentation of relevant international efforts.

It should thus be underlined that benefit-sharing is increasingly deployed in human rights case law,[149] UN official reports and agendas on human rights,[150] and human rights scholarship[151] in connection with the need to protect indigenous peoples from unsustainable forms of natural resource exploitation and from environmental protection measures that disregard human rights. However, human rights discourse on benefit-sharing still appears to be at an early stage of development both in relation to states' obligations to protect and promote human rights, and in relation to the responsibility of private companies to respect human rights. At best, human rights

[146] 'Refinement and Elaboration of the Ecosystem Approach, Based on Assessment of Experience of Parties in Implementation', in *Ecosystem Approach*, *supra* note 133, annotations to rationale to Principle 4; and *International Guidelines for Activities Related to Sustainable Tourism Development*, *supra* note 144, para. 23.

[147] Conference of the Parties to the Convention on Biological Diversity, *Decisions for the Eleventh Meeting*, UN Doc. UNEP/CBD/COP/11/1/Add.2, 21 September 2012, at 55.

[148] De Jonge, 'What is Fair and Equitable Benefit-sharing?', 24 *Journal of Agricultural & Environmental Ethics* (2011) , 127.

[149] African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International *on Behalf of the Endorois Community v. Kenya* (Comm. No. 276/2003), 4 February 2010; ILO Committee of Experts on the Application of Conventions and Recommendations, Observations on Peru, CEACR 2009/80th Session, in ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILC.102/III(1A), 2013, at 841.

[150] Office of the UN High Commissioner for Human Rights, *Indigenous Peoples and Human Rights: Setting a Framework for Consultation, Benefit-Sharing and Dispute Resolution*, UN Doc. A/HRC/EMRIP/2009/5, 3 July2009; UN-Indigenous Peoples Partnership, *Strategic Framework 2011-2015* (undated), at 13, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_186285.pdf; *Report of the Special Rapporteur on Indigenous Peoples' Rights*, UN Doc. A/HRC/15/37, *supra* note 110.

[151] Shelton, 'Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon', 105 *AJIL* (2011) 60; Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights', 22 *EJIL* (2011) 165.

bodies make reference to benefit-sharing guidelines elaborated in the framework of the CBD without much discussion. On the academic side, no in-depth study yet exists on the implications of the incipient cross-fertilization between the CBD and human rights law and on the merits of further convergence between these two branches of international law with respect to corporate accountability. This overlooked issue in the well-established debate on human rights and the environment[152] deserves to be further explored in order to fully understand the theoretical and practical implications of substantive and procedural synergies between these two bodies of international law for more effective human rights and environmental protection. This understanding seems particularly needed for the operationalization of the UN Framework on Business and Human Rights.

Among states, future research should assess whether, to what extent and under which conditions benefit-sharing can help overcome impasses between developed and developing countries in current multilateral environmental negotiations by favouring solutions to environmental challenges that facilitate consensus on an equitable allocation of responsibilities that takes into account economic and non-economic benefits. Consequently, recourse to benefit-sharing can be made among states to address difficulties in equitably sharing responsibilities in the light of differentiated capabilities of developed and developing states vis-à-vis various environmental challenges. In that respect, benefit-sharing could be explored in the context of the implementation of common but differentiated responsibility,[153] which has emerged as the veritable bottleneck in the context of multilateral environmental (including climate) negotiations.[154] Such understanding should also take into account instances in which private companies are pivotal for the fulfilment of states' international

[152] E.g. A. Boyle and M. R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1998); Francioni, 'International Human Rights in an Environmental Horizon', 21 *EJIL* (2010) 41; Boyle, 'Human Rights or Environmental Rights: A Reassessment?', 18 *Fordham Environmental Law Review* (2007) 471; S. Kravchenko and J. Bonine, *Human Rights and the Environment*, (2008); D. K. Anton and D. Shelton, *Environmental Protection and Human Rights* (2012); Boyle, 'Human Rights and the Environment: Where Next?', 23 *EJIL* (2012) 613, and this volume, Chapter 6.

[153] Eg, Hey, 'Common but Differentiated Responsibilities', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010), available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1568?rskey=6tAH9I&result=2&q=&prd=EPIL; L. Rajamani, *Differential Treatment in International Law* (2006); Stone, 'Common but Differentiated Responsibilities in International Law', 98 *AJIL* (2004) 276.

[154] Honkonen, 'The Principle of Common but Differentiated Responsibility in Post-2012 Climate Negotiations', 18 *RECIEL* (2009) 257.

environmental and human rights obligations, such as in the case of access to technologies.

Within states, future research should assess whether, to what extent and under which conditions benefit-sharing can contribute to ensuring respect for the human rights of indigenous peoples and local communities in the conservation and sustainable use of natural resources by governments. This understanding would be necessary to better frame the responsibility of private companies in respecting the rights of indigenous peoples and local communities in carrying out extractive and other natural resource-based development activities.

While further research should focus on international law developments on benefit-sharing vis-à-vis the duties of governments, attention should also be turned to a burgeoning transnational practice that has emerged on benefit-sharing in connection with the use of 'biocultural community protocols'.[155] These are documents in which indigenous peoples and local communities articulate their values, traditional practices and customary law concerning environmental stewardship, based upon the protection afforded to them by international environmental and human rights law.[156] Crucially, through such instruments, communities express their understanding of the most culturally and biologically appropriate form of benefit-sharing in a specific context, as a basis for cooperation with governments and private companies. This practice developed in parallel with international negotiations on benefit-sharing related to access to genetic resources under the CBD and eventually affected these negotiations. It provides a fascinating example of mutual interactions between different levels of environmental regulation. First, community protocols operate through the interaction of international law, national law and the customary law of indigenous and local communities. Second, these protocols are promoted by transnational networks of legal advisors, including from intergovernmental organizations, NGOs and bilateral

[155] Eg, United Nations Environment Programme (UNEP), *Community Protocols for ABS* (undated), available at http://www.unep.org/communityprotocols/index.asp; Jonas, Bavikatte, and Shrumm, 'Community Protocols and Access and Benefit Sharing', 12 *Asian Biotechnology and Dev. Rev.* (2010) 49; and a series of publications by Natural Justice, available at http://naturaljustice.org/library/our-publications.
[156] Morgera and Tsioumani, 'The Evolution of Benefit-sharing', *supra* note 3, at 157-158.

development partners supporting local communities in developing countries.[157] Third, community protocols have, in a remarkably short period of time, received formal recognition in international law in the context of a legally binding instrument that addresses both inter-state and intra-state benefit-sharing.[158]

A more thorough academic investigation of community protocols could help elucidate the interactions of the customary laws of indigenous peoples and local communities with international and national law on the environment and on human rights. The study of the role of customary laws of indigenous peoples and local communities to contribute to sustainability is still in its infancy, although customary laws are considered 'a resource capable of inspiring innovation and legitimizing practical activities in the process of administering living resources and adapting to changing circumstances in a changing world'.[159] Critically for present purposes, community protocols are also being used to ensure corporate accountability,[160] and may represent a constructive and possibly cost-effective tool for private companies to factor in the linkages between environmental protection and human rights law in a specific context, as understood and agreed upon by the relevant indigenous peoples or local communities.

Ultimately, future research needs to ascertain whether the translation of legal obligations on international biodiversity into corporate environmental accountability standards, and their cross-fertilization with instruments and processes related to corporate responsibility to respect human rights, effectively contribute to advancing either or both agendas,[161] or whether there are significant risks of diluting or weakening international obligations in the process.[162] Equally, it remains to be ascertained whether the much more developed and consolidated adjudicatory systems

[157] See the UNEP website on community protocols case studies, available at: www.unep.org/communityprotocols/casestudies.asp; and the website of a coalition of different actors on community protocols, available at: www.community-protocols.org/.
[158] *Nagoya Protocol*, *supra* note 139, Arts 12 and 21.
[159] P. Ørebech *et al*., *The Role of Customary Law in Sustainable Development* (2006).
[160] More generally on corporate accountability and the Nagoya Protocol, see Oliva, 'The Implications of the Nagoya Protocol for the Ethical Sourcing of Biodiversity', in Morgera, Buck and Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective, supra* note 139, 371.
[161] Note for instance the positive appraisal of the IFC Performance Standards from a human rights perspective by the Special Rapporteur on the Rights ofIndigenous Peoples (2012 Report, supra note 110, para. 78).
[162] The 2006 IFC Performance Standards, *supra* note 82, have been seen as weakening international biodiversity law by Affolder, *supra* note 94, at 190.

under international and regional human rights instruments can contribute to better implementation of international environmental law. This may be done through cases on environmental degradation which amount to human rights violations and through cases which concern the positive obligations of states to prevent or remedy corporate environmental harm.[163]

7. Corporate Accountability and the Green Economy

Conceptual and normative international legal developments related to corporate environmental accountability are increasingly deployed to better define and operationalize the corporate responsibility to respect human rights. In particular the legal concept of 'benefit-sharing' as developed under the Convention on Biological Diversity appears to be increasingly called upon to bridge the environmental and human rights dimension of corporate accountability, in particular in relation to indigenous peoples and local communities.[164] Several questions, however, remain to be explored in that regard.

The concept of benefit-sharing is also rapidly emerging in other areas of international environmental regulation, although its implications for the interaction between environmental protection, human rights law and corporate accountability are still to be teased out. For example, benefit-sharing has been discussed in the context of transboundary natural resources, [165] especially international watercourses [166] In addition, a benefit-sharing mechanism may emerge under the law of the sea, from current negotiations on marine genetic resources beyond areas of national

[163] Francioni, 'The Private Sector and the Challenge of Implementation', in P. M. Dupuy and J. Vinuales (eds), *supra* note 4, 24, at 36-37.
[164] Morgera and Tsioumani, 'The Evolution of Benefit-sharing', *supra* note 3, at 165-167. The normative developments under the CBD (in the form of decision of its Conference of the Parties) have therefore provided the sufficiently precise guidance that is needed for corporate accountability: *contra*, Affolder, *supra* note 94, 159, who asserts that the Convention 'is not easily translated into performance standards or specific project requirements.' (at 181).
[165] N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (2008).
[166] Wouters and Moynihan, 'Benefit-sharing in International Water Law', in A Rieu-Clarke and F. Loures (eds), *The UN Watercourses Convention in Force – Strengthening International Law for Transboundary Water Management* (2013).

jurisdiction.[167] Benefit-sharing has also recently received some attention in the fight against climate change. In that regard, attention has predominantly focused on the establishment of a mechanism to reduce emissions from deforestation and degradation (so-called REDD+) and the need to avoid the further marginalization of vulnerable forest communities. [168] Other contributions have addressed benefit-sharing in connection with the Clean Development Mechanism, adaptation, and agriculture and land uses,[169] offering some general considerations on improved equity in market-based mechanisms to curb climate change.[170]

No academic study to date, however, has attempted to develop a comprehensive and systematic interpretation of benefit-sharing across different international environmental regimes – let alone of its relevance for corporate accountability and human rights. There is therefore a need for scholarly attention to be directed to the potential of benefit-sharing as a comprehensive and flexible regulatory approach to *operationalize equity across* international environmental regimes, in particular, intra-generational equity[171] – equity among stakeholders of the same generation on the basis of self-determination, cultural diversity and maintenance of ecological

[167] *Recommendations of the UN General Assembly's Ad Hoc Open-ended Informal Working Group on Marine Biodiversity*, Annex to UN Doc. A/66/119, 30 June 2011, para. 1(b), endorsed by GA Res 66/231 (2011), para. 167. E.g. De la Fayette, 'A New Regime for the Conservation and Sustainable Use of Marine Biodiversity and Genetic Resources Beyond the Limits of National Jurisdiction', 24 *International Journal of Marine and Coastal Law* (2009) 221; Drankier *et al*., 'Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit-Sharing', 27 *IJMCL* (2012) 375; and T. Greiber, *Access and Benefit Sharing in Relation to Marine Genetic Resources from Areas Beyond National Jurisdiction: A Possible Way Forward – Study in Preparation of the Informal Workshop on Conservation of Biodiversity Beyond National Jurisdiction*(2011), available at http://www.bfn.de/fileadmin/MDB/documents/service/Skript_301.pdf.

[168] Baez, 'The "Right" REDD Framework: National Laws that Best Protect Indigenous Rights in a Global REDD Regime', 80 *Fordham L. Rev.* (2011) 821; Greenleaf, 'Using Carbon Rights to Curb Deforestation and Empower Forest Communities', 18 *NYU Envtl. L.J.* (2011) 507; and L. Peskett, *Benefit-Sharing in REDD+: Exploring the Implications for Poor and Vulnerable People* (2012), available at http://redd-net.org/files/BenefitSharingReport.pdf.

[169] Voigt, 'Is the Clean Development Mechanism Sustainable: Some Critical Aspects', 8 *Sustainable Dev. L. & Pol'y* (2007) 15; Hunter, 'The Confluence of Human Rights and the Environment: Human Rights Implications for Climate Change Negotiations', 11 *Or. Rev. Int'l L.* (2009) 331; C. Streck., *Towards Policies for Climate Change Mitigation: Incentives and Benefits for Smallholder Farmers* (2012), available at http://cgspace.cgiar.org/bitstream/handle/10568/21114/ccafsreport7-smallholder_farmer_finance.pdf.

[170] Concerns in this regard are raised by Francioni, 'Realism, Utopia and the Future of International Environmental Law', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 442.

[171] Bartow, Magraw and Hawke, 'Sustainable Development', in Bodansky, Brunnée and Hey (eds), *Oxford Handbook of International Environmental Law*, *supra* note 138, 613, at 630.

integrity.[172] The recourse to equity in an intra-generational context is more novel than in an inter-generational context and remains debatable in international law.[173] In this respect, benefit-sharing can be explored as a cross-cutting tool for empowerment, participation and partnership among states, local and indigenous communities, and the private sector.

Finally, it would appear useful to place future research on benefit-sharing within the policy discourse on the green economy, which emphasizes opportunities for business development, job creation and public-sector savings arising from environmental management.[174] Among other things, the idea of the green economy also calls for a synergetic approach to tackling climate, biodiversity and energy crises.[175] In that respect, research will determine whether benefit-sharing can work as a 'bridge' between different international regimes that tend to develop and operate without due consideration of other international agreements,[176] with a view also to developing an understandable and workable benchmark for private companies.

At the UN Conference on Environment and Development in June 2012, the international community encouraged a transition to a green economy.[177] The details of a transition to a green economy, however, remain controversial. Fears of the imposition of a profit-driven and high-tech agenda for environmental management[178] have fuelled criticism that the promotion of a green economy may not be fair to developing countries that lack necessary funding and technology. Equally, the green economy agenda has given rise to human rights concerns about the further marginalization of indigenous and local communities that contribute to environmental conservation and management in ways that are difficult to capture in

[172] Francioni, 'Equity in International Law', in R. Wulfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010), available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1399?rskey=3CUa8g&result=1&q=&prd=EPIL.
[173] Birnie, Boyle and Redgwell, *supra* note 17, at 123.
[174] Larcom and Swanson, 'Economics of Green Economies: Investment in Green Growth and How it Works' in Dupuy and Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection, supra* note 4, 97.
[175] Steiner, 'Focusing on the Good or the Bad: What Can International Environmental Law Do To Accelerate the Transition Towards a Green Economy?', 103 *Am. Soc'y Int'l L. Proc*. (2009) 3.
[176] Francioni, 'Equity in International Law', *supra* note 172.
[177] GA Res. 66/288, 'The Future We Want', 11 September 2012, Annex, at paras 56 and 62.
[178] Doran, 'Care of the Self, Care of the Earth: A New Conversation for Rio+20?', 21 *RECIEL* (2012) 31.

purely economic terms.[179] With respect to corporate accountability, the Rio+20 outcome document[180] has been generally considered 'disappointing' from the viewpoint of the protection of the rights of indigenous peoples, particularly insofar as it neglected to draw attention to the negative impacts of extractive industries.[181] Notably, the Rio+20 Summit also missed the opportunity to tightly link the UN Framework on Business and Human Rights with relevant global environmental standards and the emerging notion of the green economy.[182] The Summit, however, succeeded in embedding in the concept of a green economy the need to take into account human rights and the specific contributions of indigenous peoples and local communities to environmental management as a strategy towards achieving sustainable development.[183] It also clearly pointed to the role of the Convention on Biological Diversity to bring forward economic valuation as a tool for more effective environmental integration, treaty implementation and involvement of the private sector.[184] Thus further normative developments under the CBD on the notion of economic valuation of ecosystem services should be carefully studied to determine whether benefit-sharing can serve to systematically implement the green economy as an opportunity to mainstream equity across different international environmental regimes, by combining a focus on economic benefits with due attention to non-economic (social, cultural and environmental) ones. These future developments may well further contribute to corporate environmental accountability and corporate respect for human rights.

[179] Shelton, 'Commentary on Achim Steiner's 2009 Grotius Lecture', 25 *Am. U. Int'l L. Rev*. (2010) 877.
[180] 'The Future We Want', *supra* note177, para. 228.
[181] *Report of the UN Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc. A/67/301, supra note 120, para. 68.
[182] Morgera and Savaresi, 'A Conceptual and Legal Perspective on the Green Economy', *supra* note 22, at 26-27.
[183] 'The Future We Want', *supra* note177, para. 58(j).
[184] *Ibid.*, para. 201.